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IN THE

Supreme Court of the United States

KEITH LAVON BURGESS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether 21 U.S.C. § 841(b)(1)(A), which imposes the 20-year mandatory minimum sentence upon certain defendants previously convicted of a "felony drug offense," applies to a defendant previously convicted of a state offense classified as a misdemeanor under state law but punishable by more than one year's imprisonment.

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BRIEF FOR THE PETITIONER

Petitioner Keith Lavon Burgess respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. 1a-10a) is published at 478 F.3d 658.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2007. A timely petition for a writ of certiorari was filed on May 17, 2007. This Court granted the petition on December 7, 2007. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

21 U.S.C. § 841(a)(1) provides, in relevant part:

> [I]t shall be unlawful for any person knowingly or intentionally –
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance . . . .

21 U.S.C. § 846 provides:

> Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 841(b)(1)(A) provides, in relevant part:

> If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years . . . .

21 U.S.C. § 802(13) provides:

> The term "felony" means any Federal or State offense classified by applicable Federal or State law as a felony.

21 U.S.C. § 802(44) provides:

> The term "felony drug offense" means an offense that is punishable by imprisonment for more than one year under any law of the United States or State or of a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

Prior versions of relevant provisions are collected in Appendix B to this brief.

STATEMENT

1. In 2002, petitioner Keith Burgess was arrested in South Carolina for possession of a small amount of cocaine in violation of S.C. Code Ann. § 44-53-370(d)(1). App. 3a; CA J.A. 79.[1] Like federal law, South Carolina classifies simple possession of cocaine with no prior drug offenses as a misdemeanor. *See* S.C. Code Ann. § 44-53-370(d)(1); *compare* 21 U.S.C. § 844; 18 U.S.C. § 3559. Although the offense was punishable by up to two years imprisonment, S.C. Code Ann. § 44-53-370(d)(1), the state court gave petitioner a one year suspended sentence, with two years of probation and fifty hours of community service. CA J.A. 79.

2. In 2003, Mr. Burgess pled guilty in federal court to a single count of conspiracy to dispute 50 grams or more of base cocaine in violation of 21 U.S.C § 841(a). The Government requested that the district court apply the sentencing enhancement set forth in 21 U.S.C. § 841(b)(1)(A)(viii). That provision states that "[i]f any person commits such a violation after a prior conviction for a felony drug offense has become final," the defendant shall be subject to a mandatory minimum sentence of 20 years imprisonment. *Id.*[2] The Government argued that petitioner's prior South Carolina conviction constituted a "prior felony drug

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[1] "CA J.A." refers to the Joint Appendix filed in the court of appeals, the second volume of which, containing the presentence investigation report, was filed under seal. Both volumes are available in the record on appeal.

[2] The statute further provides that "if death or serious bodily injury results from the use of such substances," the defendant "shall be sentenced to life imprisonment." *Id.* Because no death or injury resulted from the offense conduct in this case, that provision does not apply here.

offense" within the meaning of the statute, even though the offense is considered a misdemeanor under state law, because the offense was punishable by more than a year's imprisonment. CA J.A. 31-32. Petitioner, on the other hand, argued that the state's classification of his prior offense as a misdemeanor precluded the court from treating it as a "felony drug offense" under the federal enhancement provision. CA J.A. 25-27.

The parties' disagreement centered on two provisions of the definitions section of the Controlled Substances Act, 21 U.S.C. § 802. Between 1988, when Congress extended the enhancement provision to apply to defendants with prior state felony drug convictions, and 1994, when the statute was amended to its present form, the definition of a qualifying prior drug "felony" offense was provided solely by Section 802(13), which defines the term "felony" to mean "any Federal or State offense classified by applicable Federal or State law as a felony."

In 1994 "Conforming Amendments" to the Act, Congress added a definition of "felony drug offense" while retaining the prior definition of "felony." Pub. L. 103-322 § 90105. The new definition of "felony drug offense" provided that the "term 'felony drug offense' means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs. . . ." *Id.*

Consistent with the interpretation given the modified Act by the D.C. Circuit in *United States v. West*, 393 F.3d 1302 (D.C. Cir. 2005), petitioner argued that the Act permitted an enhancement only for those prior offenses that qualify as a "felony" under Section 802(13) – *i.e.*, those considered felonies

under state law – and also qualify as a "felony drug offense" under Section 802(44) – *i.e.*, offenses that are punishable by more than a year's imprisonment under state law. CA J.A. 25-27, 34-35. The Government, on the other hand, argued that the 1994 conforming amendments effectively displaced Section 802(13)'s role in defining the scope of the 20-year enhancement provision, leaving the scope of Section 841(b)(1)(A) defined solely by reference to Section 802(44). *See* CA J.A. 31. Under that view, it was enough that petitioner's prior state offense was punishable by more than a year, even though both state and federal law treat such offenses as misdemeanors, and even though petitioner was actually given a one-year suspended sentence.

The district court accepted the Government's view of the statute and applied the mandatory minimum 20-year sentence. CA J.A. 39-40. The court granted petitioner a downward departure for substantial assistance and sentenced him to 156 month's imprisonment. CA J.A. at 54-55.

3. Petitioner appealed and the Fourth Circuit affirmed. The court acknowledged that Section 841(b)(1)(A) does not itself define what constitutes a "felony" offense for purposes of triggering its 20 year mandatory minimum, App. 7a, and did not dispute that the definition section of the statute provides two definitions that, on their face, are applicable. Nor did the court dispute petitioner's contention that it is possible to read Section 802(44) as incorporating the felony classification requirement in Section 802(13). But the court of appeals nonetheless decided that "[b]ecause the term 'felony drug offense' is specifically defined in § 802(44), and § 841(b)(1)(A) makes use of that precise term, the logical, commonsense way to interpret 'felony drug offense' in § 841(b)(1)(A) is by

reference to the definition in § 802(44)" alone. App. 8a (quoting *United States v. Roberson*, 459 F.3d 39, 52 (1st Cir. 2006)). The Fourth Circuit did not contest that its reading adopted a more expansive view of a criminal statute, an interpretation that would conflict with the rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)), if that rule were applicable. But the court concluded that the rule of lenity had no application here because it found "no grievous ambiguity or uncertainty in the pertinent statutes." App. 8a (citation and internal quotation marks omitted).

Petitioner filed a pro se petition for certiorari, which this Court granted on December 7, 2007. 128 S.Ct. 740.

SUMMARY OF THE ARGUMENT

The circuits have divided over whether state misdemeanor drug convictions constitute "prior conviction[s] for a felony drug offense" under Section 841(b)(1) of the Controlled Substances Act. While it was clear for most of the Act's history that no state conviction classified by the state as a misdemeanor could be a "felony drug offense," the meaning of the term "felony drug offense" was rendered ambiguous in 1994 by what Congress labeled technical "Conforming Amendments." These amendments created a new definition for the term "felony drug offense," while leaving untouched the Act's pre-existing definition for "felony." The new definition of "felony drug offense" defines the term without specifying whether it covers "offense[s]" beyond those classified under state law as felonies.

The court of appeals below deemed the two definitions in conflict and concluded that the newer definition, more precisely tailored to Section 841(b)(1)(A), should displace the definition of "felony" that had long governed the enhancement provision's scope. That is perhaps a plausible construction of the statute. But it is a view that is substantially undermined by the drafting history of the Act, long-standing doctrine disfavoring repeals by implication, and the underlying purposes of the statute. Instead, these considerations support the view that Congress intended the newer definition to incorporate the older, allowing both definitions to be read together and avoiding the implication that Congress has dramatically expanded the coverage of a severe mandatory minimum sentencing provision through "conforming amendments" and without a word of explanation in the legislative history.

A criminal statute subject to two plausible constructions, one harsher than the other, must be resolved in favor of lenity. Congress has legislated against the backdrop of the rule of lenity for generations, aware that when it intends to make previously innocent conduct criminal, or increase the penalty for previously illegal conduct, it must make that intention plain. Strict application of the rule of lenity is especially appropriate in the context of mandatory minimum sentencing, which alters the traditional allocation of sentencing authority among the branches and where a mistaken interpretation can result in particularly severe consequences that may be, as a practical matter, difficult for Congress to correct. On the other hand, there is every reason to believe that Congress stands at the ready to revise an unduly lenient construction, as the history of this sentencing provision illustrates.

ARGUMENT

In punishing more severely those defendants previously convicted of a "felony drug offense" under state law, Section 841(b)(1)(A) gives rise to a common ambiguity. While the term "felony" is widely used in the law, its precise definition varies from jurisdiction to jurisdiction. Congress resolved the ambiguity when it drafted the Controlled Substances Act by deferring to the sentencing state's treatment of an offense. But a technical amendment in 1994 created new ambiguity by subjecting the term "felony drug offense" to two facially applicable statutory definitions, neither of which expressly incorporates or trumps the other. As a result, reasonable jurists on different courts have reached conflicting constructions of the Act. The better view – supported by the text, structure, history and purposes of the Act, and required by the rule of lenity – is that Congress incorporated the pre-existing definition of "felony" into the new, more specific definition of "felony drug offense," sensibly limiting the severe 20-year mandatory minimum sentence to those who have committed prior state offense sufficiently serious *both* to be considered felonies in the convicting state *and* to warrant punishment of more than a year's imprisonment.

I. Under The Best Reading Of The Statute, Section 841(b)(1)(A) Applies To Prior State Convictions Classified As Felonies By The State And Subject To More Than One Year's Imprisonment.

Confronted with the question presented here, the D.C. Circuit held that the two definitions in Section 802 should be read together. This construction of the Act – rejected by the Fourth Circuit in this case – is

consistent with the purposes of the statute, its historical evolution, and the legal background against which Congress acted when it passed the 1994 conforming amendments giving rise to the statutory ambiguity at issue in this case.

A. The Statutory Text And History Support The View That Congress Intended Section 802(44) To Be Read In Conjunction With Section 802(13).

1. The Controlled Substances Act in general, and Section 841(b)(1)(A) in particular, are the result of an accretion of legislative amendments over the past three and a half decades.

Original Form. As originally enacted in 1970, Section 841(b)(1)(A) of the Controlled Substances Act imposed a maximum 30-year sentence upon individuals with prior *federal* felony drug convictions. 21 U.S.C. § 841(b)(1)(A) (1970).[3] In a separate definition section applicable to the Act as a whole, the statute defined the word "felony" to mean, "any Federal or State offense classified by applicable Federal or State law as a felony." 21 U.S.C. § 802(13) (1970).

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[3] The provision stated: "If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both." 21 U.S.C. 841(b)(1)(A) (1970).

1984 Amendment. In 1984, Congress extended the enhancement provision to those convicted of a prior *state* felony drug offense, and increased the maximum enhanced sentence to 40 years. *See* Pub. L. 98-473 § 502(1)(A). Thus, as amended, the enhancement applied to "any person [who] commits such a violation after one or more prior convictions of him . . . for a felony under any . . . other law of a State, the United States, or a foreign country relating to narcotic drugs. . . ." 21 U.S.C. § 841(b)(1)(A) (1984). The enhancement provision did not itself define what constituted a "felony under any . . . law of a State . . . relating to narcotic drugs. . . ." *Id.* Instead, the statute retained the prior definition of "felony" in Section 802. *See* 21 U.S.C. § 802 (13) (1984). There was no further definition of the term "felony" or "felony drug offense" in the statute. Accordingly, the newly-extended enhancement provision did not apply in cases, such as this, in which state law classified the prior state conviction as a misdemeanor.

1986 Amendment. In 1986, Congress amended Section 841(b)(1)(A) to impose a mandatory *minimum* 20 year sentence in place of the previous *maximum* 40 year sentence. *See* Pub. L. 99-570, title I, § 1002.[4] The amendments, however, made no changes relating to the type of prior state convictions that would trigger the enhancement.

1988 Amendment. In 1988, Congress amended Section 841(b)(1)(A) again, revising the language of the provision, but not its scope. *See* Pub. L. 100-690, title VI, § 6452. The amended statute required a 20-year mandatory minimum sentence for "any person

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[4] The amendments also made Section 841(b)(1)(A) applicable to additional federal crimes. *See id.*

[who] commits such a violation after a prior conviction for a *felony drug offense* has become final." 21 U.S.C. § 841(b)(1)(A) (1988) (emphasis added). Although the revision introduced a new phrase – "felony drug offense" – Congress defined that phrase to capture precisely the same offenses as had been covered under the prior version of the Act. Thus, the statute provided that "[f]or purposes of this subparagraph, the term 'felony drug offense' means an offense that is . . . a *felony* under any law of a State . . . that prohibits or restricts conduct relating to narcotic drugs . . . ." *Id.* (emphasis added). And the word "felony," in turn, continued to be defined by Section 802(13), which continued to exclude state drug convictions for offenses considered to be misdemeanors under state law.

Accordingly, even after the 1988 amendments, courts continued to decline to apply the enhancement provision when a defendant had previously been convicted of a state drug offense considered a misdemeanor by state law. *See, e.g., United States v. Brown,* 33 F.3d 1014, 1017–18 (8th Cir. 1994);[5] *United States v. Donahue,* No. CIV.A. 92 123-1, 1993 WL 114031, at *3 (E.D.Pa. April 13, 1993); *see also United States v. Brown,* 937 F.2d 68, 70 (2d Cir. 1991) (reaching same conclusion under Section 841(b)(1)(B), which has language identical to Section 841(b)(1)(A)).

1994 Amendments. In 1994, Congress passed a comprehensive crime bill, the Violent Crime Control Act. *See* Pub. L. 103-322. In some provisions of the Act, Congress expressly and unambiguously amended

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[5] This case was decided before the 1994 conforming amendments were passed.

the Controlled Substances Act to increase existing, or to create new, sentencing enhancements. For example, in Section 90102, entitled "Increased Penalties for Drug-Dealing in 'Drug-Free' Zones," the Act required the United States Sentencing Commission to create a new "enhancement for a defendant convicted of violating section 419 of the Controlled Substances Act (21 U.S.C. 860)." *See also* Section 90101 (entitled "Enhancement of Penalties for Drug Trafficking in Prisons," amending 18 U.S.C. § 1791 to expand the drug offenses punishable under that section); Section 90103 (entitled "Enhanced Penalties for Illegal Drug Use in Federal Prisons and for Smuggling Drugs into Federal Prisons," requiring the United States Sentencing Commission to enhance the penalties for the simple possession of a controlled substance within, or the smuggling of a controlled substance into, a Federal detention facility).

None of those provisions modified the enhancement at issue here. Instead, Section 841(b)(1)(A) took its current form as the result of a what Congress labeled "Conforming Amendments."[6] The conforming amendments moved the definition of "felony drug offense" out of the body of Section 841(b)(1)(A), and into a new subsection of the general definitions section. Pub. L. 103-322 § 90105(c)-(d). Congress also changed the wording of the definition. The revised definition, which remains applicable today, provided that the term "felony drug offense" means "an offense that is punishable by imprisonment for more than one year under any law

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[6] Pub. L. 103-322 § 90105 (entitled "Conforming Amendments to Recidivist Penalty Provisions of the Controlled Substances Act and the Controlled Substances Import and Export Act").

of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." *Id.* § 90105(d).

Importantly, the 1994 conforming amendment did not alter Section 802(13) or otherwise modify the scope of its application. The amendment did not, for example, provide that Section 802(13) would no longer have application to the meaning of the word "felony" as used in Section 841(b)(1)(A) or as used in the phrase "felony drug offense" in Section 802(44). Nor did the amendment modify Section 841(b)(1)(A) to provide that the term "felony" as used in that provision would be defined solely by Section 802(44) without reference to Section 802(13).

2. In light of this drafting history and the resulting statutory text and structure, the D.C. Circuit reasonably construed the statute to permit an enhanced mandatory minimum sentence only in the case of prior state drug convictions that meets both the definition of a "felony" as defined in Section 802(13) and the definition of a "felony drug offense" as defined in Section 802(44). That construction of the Act is sensible for several reasons:

First, under the plain text of the definition section, Congress provided that each definition shall be applicable whenever the defined term is "used in this subchapter." *See* 21 U.S.C. § 802. There is no question that the word "felony" is used in both Section 841(b)(1)(A) and 802(44). In fact, at least until the 1994 conforming amendment, it was undisputed that Section 802(13) applied to define the use of the word "felony" in Section 841(b)(1)(A), and thereby the scope of the enhancement provision. When the 1988 amendment introduced the phrase

"felony drug offense" for the first time, it also defined the term "felony drug offense" by incorporating Section 802(13)'s definition of "felony." *See* Pub. L. 100-690 § 6452(a).

To be sure, when Congress moved the definition of "felony drug offense" from the body of Section 841(b)(1)(A) to the definitions section in 1994, it did not expressly repeat the term "felony" as part of the definition. But Congress was aware that the word "felony" – used as part of the defined phrase "felony drug offense" – was separately defined in the very same definition section of the statute; that the definition of "felony drug offense" under the 1988 version of the statute had previously incorporated the definition of "felony" under Section 802(13) by reference; and that the definition of "felony" in Section 802(13) had long limited the scope of the enhancement provision even prior to 1988. Congress's failure to repeat the word "felony" before the word "offense" as part of the definition of "felony drug offense" in Section 802(44) is insufficient reason to believe that Congress intended the 1994 conforming amendments to effect a sea change in the scope of the enhancement provision, sweeping up for the first time in the history of the statute offenses theoretically subject to more than a year's imprisonment but nonetheless considered too insignificant by the convicting State to warrant treatment as a felony under state law.

Instead, the better reading is that in referring to "*an offense* that is punishable by imprisonment for more than one year," 21 U.S.C. § 802(44) (emphasis added) – in a provision defining a "*felony* drug offense," and in a definition section with a prior definition of "felony" – the definition presupposed an

offense classified as a felony within the meaning of the prior definition.

Second, neither the Government nor the court of appeals questioned that the two definitional provisions can be read together. As construed by the D.C. Circuit, Section 802(13) continues to perform its long-established function of ensuring that the enhancement applies only to state offenses considered sufficiently serious by the convicting state to warrant felony classification under state law and, more importantly, the serious collateral consequences that flow from that classification. *See infra* 17-22. Section 802(44), in turn, ensures that reliance on a state's use of the label "felony" alone does not erroneously capture truly minor offenses, reserving the enhancement for crimes subject to more than a year's imprisonment regardless of the state label. *See infra* 22-23. As discussed below, such a reading is not only possible, but entirely sensible in light of the statutory history and congressional purposes. *See infra* 17-24.

Third, a contrary reading would effectively impute upon Congress the intent to effect an implied partial repeal of Section 802(13), withdrawing its application from one of the principal provisions to which it had long applied through multiple prior revisions of the statute. But this Court has long held – and Congress in drafting statutes like the 1994 amendments in this case has long understood – that courts are reluctant to find that a new enactment has impliedly repealed a prior statutory provision, even in part. *See, e.g., Watt v. Alaska*, 451 U.S. 259, 266-67 (1981); *Morton v. Mancari*, 417 U.S. 535, 549-551 (1974); *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936). Accordingly, when Congress truly intends to

render a prior statutory provision partially ineffective, it can be expected to do so clearly and directly. At the same time, and for that reason, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton*, 417 U.S. at 551. As noted above, there is no question that both definitional provisions can be read together and rendered effective. And there is no clear indication that Congress intended any other treatment.

Fourth, reading the two definitional provisions together is especially appropriate here, given that Congress for many years, and through many revisions of the Act, indisputably intended Section 802(13) to play an important role in identifying state convictions sufficiently serious to trigger the Section 841(b)(1)(A) enhancement. This Court should not lightly impute a congressional intent to alter course dramatically without a clearer indication that such an alteration was intended.

Fifth, this hesitation is particularly warranted in this case, where the alleged revision to Section 802(13)'s scope was accomplished through a provision expressly labeled as "Conforming Amendments." Pub. L. 103-322 § 90105. That is a title Congress does not ordinarily use for a measure intended to effect a significant substantive expansion of a criminal sentencing provision. *See, e.g., Dir. of Revenue of Mo. v. CoBank ACB*, 531 U.S. 316, 324 (2001) (refusing to read conforming amendment as having substantive effect); *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text."). The choice of title is particularly instructive in this case as the

immediately preceding provisions, which unambiguously enacted sentencing enhancements, were expressly labeled as such. *See* Pub. L. 103-322 §§ 90101-03.[7]

B. Reading Both Definitions Together Is Also Consistent With The Statute's Purposes.

Applying both Section 802(13) and Section 802(44) is consistent with the underlying purposes of the statute.

1. Given the severity of Section 841(b)(1)(A)'s enhancement, it is not surprising that Congress would have expected that it would apply only to those previously convicted of a state drug offense serious enough to be classified as a felony. For the first ten years the enhancement applied to state felonies, Congress deferred entirely to the states' characterization of the prior conviction, relying on the states to distinguish serious from less serious crimes through the traditional distinction between misdemeanor and felony offenses. 21 U.S.C. § 802(13) (1984).

Deferring to the states' classification was, in general, an effective proxy for gauging the seriousness of a prior state offense.[8] Traditionally, the divide

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[7] Nothing in the legislative history of the 1994 Amendment suggests a contrary conclusion. Although the legislative history for the Violent Crime Control Act as a whole is extensive, it does not contain any useful clues concerning the purpose of the conforming amendments at issue here. *See, e.g.*, H. Rep. 103-694 (1994); H. Rep. 103-711 (1994).

[8] Congress made a similar calculation when it enacted the Armed Career Criminal Act of 1984, codified in 18 U.S.C. §§ 921, 924(e). That statute provides enhanced punishment for individuals with a prior "violent felony" conviction. *See id.*

between felonies and misdemeanors has reflected a state's considered view of which offenses were relatively minor and which passed over a threshold requiring the application of the law's severest punishments. *See, e.g.*, Rollin M. Perkins & Ronald M. Boyce, CRIMINAL LAW 15 (3d ed. 1982) ("The difference in treatment between felonies and misdemeanors has carried over from common law to current practice, and today's misdemeanors are often treated differently . . . [in] the consequences of a conviction."). Accordingly, states have widely attached serious collateral consequences to felony convictions that are not applied to those convicted solely of misdemeanor offenses. *See Blackledge v. Perry*, 417 U.S. 21, 28 n.6 (1974) ("Even putting to one side the potentiality of increased incarceration, conviction of a 'felony' often entails more serious collateral consequences."); *see also Richardson v. Ramirez*, 418 U.S. 24, 48-54 (1974) (discussing historical use, and judicial approval, of felon disfranchisement).

To be sure, there are other possible proxies as well, including the maximum potential term of imprisonment. But Congress could well conclude that

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§ 924(e)(1). The statute generally defines "violent felony" to include certain crimes "punishable by imprisonment for a term exceeding one year." *Id.* § 924(e)(2)(B). But in the definition section, Congress excluded from the definition of "crimes punishable by imprisonment for a term exceeding one year," any State offense "classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." *Id.* § 921(a)(20)(B). While Congress did not draw precisely the same line here, the ACCA example demonstrates that Congress will sometimes limit the scope of a definition of the word "felony" through a separate provision that defers to a State classification decision.

reliance on that proxy alone could be misleading, falsely identifying some prior convictions as significantly more serious than is warranted by the facts of the case. This problem may be particularly acute in the case of state drug convictions. A number of states permit punishment of over a year for relatively minor offenses that they classify as misdemeanors and that other states and the federal government would likewise consider misdemeanors and subject to less than a year's imprisonment. Simple possession cases, like petitioner's prior state conviction, are the most common. Many states and the federal government[9] treat simple cocaine possession – and most states and the federal government treat simple marijuana possession – by an individual with no prior drug record as a misdemeanor punishable by less than a year's imprisonment.[10] However, a number of states, while classifying such crimes as misdemeanors, allow a term of imprisonment of more than one year.[11] And

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[9] The CSA, which proscribes drug-related felony and misdemeanor offenses under federal law, generally punishes trafficking crimes as felonies and simple possession offenses as misdemeanors. *See* 21 U.S.C. §§ 841–844. For example, if the predicate offense at issue in this case had been prosecuted under federal law, the CSA would have classified it as a misdemeanor and the defendant clearly would not have received an enhanced sentence for his second offense. 21 U.S.C. § 844(a); 18 U.S.C. § 3559(a) (a conviction under the CSA for a first offense of simple possession of cocaine is classified as a Class A misdemeanor and punishable by no more than one year in prison).

[10] For a survey of state drug laws, see NATIONAL SURVEY OF STATE LAWS 170-210 (Richard A. Leiter ed., Thomson Gale 2005).

[11] *See, e.g.*, COLO. REV. STAT. § 18-18-406(4)(a) (2007) (classifying possession of between one and eight ounces of

California subjects such crimes to more than a year's imprisonment, but leaves to the sentencing judge's discretion both the length of any actual sentence and the classification of the conviction as a felony or a misdemeanor. *See, e.g.*, CAL. PENAL CODE § 17(b) (2007); CAL. HEALTH & SAFETY CODE § 11357(a) (2007).

In light of such variability, Congress could well conclude that reliance on the potential term of imprisonment for a state offense could lead to the imposition of harsh mandatory minimum sentences on individuals who were not the serious repeat offenders Section 841(b)(1)(A) was meant to target. And Congress could well have been concerned that it would be exceedingly unfair to apply the Act's severe

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marijuana as a "Class 1 misdemeanor," punishable under COLO. REV. STAT. § 18-1.3-501 (2007) by up to 18 months); MD. CRIM. LAW § 5-601 (2007) (punishing possession of controlled substances as a misdemeanor and providing punishment of imprisonment by up to four years); 35 PA. STAT. ANN. § 780-113(b) (2005) (classifying drug offenses including possession as misdemeanors and authorizing punishment of up to three years' incarceration); MASS. GEN. LAWS ANN. ch. 94C, § 34 (2007) (second and subsequent offenses for possession of cocaine and first offenses for possession of heroin punishable by up to two years in county house of correction, although still classified as misdemeanors under MASS. GEN. LAWS ANN. ch. 274, § 1 (2007)); S.C. CODE ANN. § 44-53-370(d)(1)(2006) (a person who knowingly possesses certain classified drugs, including cocaine "is guilty of a misdemeanor" and subject to up to two years' imprisonment); VT. STAT. ANN. tit. 18, § 4230 (2007); VT. STAT. ANN. tit. 13, § 1 (2007) (second marijuana offense punishable by up to two years which state defines as misdemeanor).

In addition, several other states authorize enhancements for subsequent offense misdemeanors, making them punishable by greater than one year. *See, e.g.*, WASH. REV. CODE ANN. § 69.50.408(1) (2007); W.VA. CODE ANN. § 60A-4-408 (2007).

mandatory minimum to individuals who would not be subject to that extreme punishment had they been convicted of precisely the same offense in another state or in federal court.

Relying on states' classification of an offense also reflects deference to the judgment of Congress's co-equal sovereigns in an area in which states have traditionally exercised primary jurisdiction and have developed special expertise. *Cf. United States v. Emmons*, 410 U.S. 396, 411-12 (1973) ("Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . We will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.") (quoting *Bass*, 404 U.S. at 349). Congress would have been aware that in our federal systems, states "serve as a laboratory" in "novel economic and social experiments without risk to the rest of the country." *New State Ice v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting). This has been especially true in the area of drug enforcement policy, where states have experimented with differing responses to the use of illegal drugs. *See generally* Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783 (2004). It is quite possible, for example, that a state could decide to make a minor misdemeanor possession offense subject to more than a year's imprisonment not because the state viewed the offense as more serious than does its neighbors or the federal government, but rather to allow sentencing judges the discretion to decide that an offender would benefit from longer access to prison drug treatment services or at least from a longer period of isolation from access to addictive substances. A state might,

however, be deterred from such a course by the prospect that every person subsequently convicted of that crime – even if that person, like petitioner, were given no actual jail time at all – would be at risk of severe federal punishment on a subsequent federal conviction.

At the same time, Congress could have believed that the addition of Section 802(44) served a similarly important, and supplementary purpose, removing from the purview of Section 841(b)(1)(A) low-level drug offenses punishable by less than one year but nonetheless classified as felonies in some states. For example, Arizona, like the majority of states and the federal government, prescribes probation or at most one year in prison for simple marijuana possession offenses, indicating that it considers possession for personal use as a less serious crime than other drug offenses. *See* ARIZ. REV. STAT. ANN. § 13-901.01 (2007). Nonetheless, Arizona classifies these possession offenses as felonies. *See* ARIZ. REV. STAT. ANN. §§ 13-701, 13-3405 (2007) (defining possession of marijuana of less than two pounds and possession of drug paraphernalia as class six felonies punishable by up to one year in prison).[12] Thus, the addition of Section 802(44) ensures that individuals with prior Arizona state convictions for the simple possession of small amounts of marijuana do not receive a mandatory 20-

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[12] The same is true in Ohio and North Carolina. *See Liao v. Rabbett*, 398 F.3d 389, 390 (6th Cir. 2005) ("Possession of heroin . . . is a "fifth degree felony" under Ohio law, but is punishable by a *maximum* term of 12 months' imprisonment.") (referring to OHIO REV. CODE § 2929.14(A)(5)); N.C. GEN. STAT. §§ 90-95(d) (classifying simple possession as a Class I felony); N.C. GEN. STAT. § 15A-1340.17 (2007) (Class I felonies not punishable by more than one year)

year mandatory minimum sentence under Section 841(b)(1)(A).

2. The court of appeals' construction of the statute, on the other hand, requires this Court to conclude that Congress intended to use the 1994 conforming amendments to radically alter the statute's operation and scope, sweeping under the enhancement provision, for the first time, thousands of minor misdemeanor violations as the basis for extraordinary criminal punishment. As noted above, numerous states make minor drug possession misdemeanors punishable by more than a year's imprisonment for first time offenders.[13] While it is not inconceivable that Congress could make that policy judgment, it is implausible that it would have enacted such an abrupt policy shift so obliquely, through "Conforming Amendments" and without a word of explanation in the text of the statute or the legislative history.

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[13] Moreover, the number of state misdemeanor offenses that would be considered felonies under Section 802(44) alone would increase substantially under the view – advanced by the United States in the context of the Armed Career Criminal Act, 18 U.S.C. § 924(e), in *United States v. Rodriquez*, No. 06-1646 (argued Jan. 15. 2008) – that a crime is "punishable by" more than a year's imprisonment if the maximum sentence under the provision exceeds a year for recidivist offenders. *See* Reply Brief for the United States at 1. Most state misdemeanor drug offenses are punishable by less than a year for a first-time offender, but more than a year for recidivists. *See* NATIONAL SURVEY OF STATE LAWS, *supra* at 170-210.

C. The Court of Appeals' Conclusion That The Statute Unambiguously Defines "Felony Drug Offense" By Reference To Section 802(44) Alone Is Incorrect.

The court of appeals did not deem it necessary to consider the statutory history or legislative purposes of the Act because it concluded that the plain language of the statute conclusively resolved the question. Relying on "commonsense," the court concluded that Congress must have intended Section 802(44) alone to define the scope of Section 841(b)(1)(A) because subsection (44) used the same phrase – "felony drug offense" – as is used in the substantive enhancement provision. App. 8a (quoting *Roberson*, 459 F.3d at 52). The comparison between language in Sections 841(b)(1)(A) and 802(44) is understandable. "Statutory definitions control the meaning of statutory words, of course, in the usual case." *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949). But as shown above, it is possible to read the language of the statutory definition in a way that gives effect to all the applicable definitions and is consistent with the drafting history of the Act and the purposes of the statute. When construing a statute, a court does not focus exclusively on "a single sentence or member of a sentence, but looks to the provisions of the whole law." *John Hancock Mutual Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 94-95 (1993) (quotation marks omitted). And when construing a single word, a court must "consider not just the bare meaning of the word but also its placement and purpose in the statutory scheme." *Bailey v. United States*, 516 U.S. 137, 145 (1995). Thus, when reading a statutory definition "in a mechanical fashion" would "create obvious incongruities" or "destroy one of the

major purposes" of another provision this Court has "concluded that Congress would not have intended such a result." *Lawson*, 336 U.S. at 201.

Invoking another canon, the Government has argued that the decision below "correctly gives the specific, later enacted statute controlling weight." BIO 12. Again, in many circumstances, the canon that the specific governs the general provides a useful rule of construction. But "[c]anons of construction need not be conclusive and are often countered . . . by some maxim pointing in a different direction." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001). Thus, canons of construction "are simply rules of thumb which will sometimes help courts determine the meaning of legislation." *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996) (internal citations omitted). The general presumption that Congress intends a more specific provision to govern a more general provision is less instructive when the more specific provision is added through an amendment that does not expressly repeal or limit the former, broader provision. In that context, the presumption against implied repeals provides the better interpretive guide. Thus, for example, in *Rodriguez v. United States*, 480 U.S. 522 (1987) (per curium), this Court was asked to decide whether a district court had discretion to give a suspended sentence to a defendant who committed a felony while on release pending trial. A prior general statute provided judges with broad authority to suspend sentences, 18 U.S.C. § 3651, but a more recent and more specific statute provided that in the context of crimes committed while on release pending trial, "shall be sentenced . . . to a term of imprisonment of not less than two years." 18 U.S.C. § 3147. The Government argued that the more recent and specific provision superseded the

older, more general provision. 480 U.S. at 524. This Court rejected that argument. Rather than applying the presumption that the specific governs the general, or that the more recent enactment controls the older provision, this Court applied instead the "well[-]settled" rule that "repeals by implication are not favored and will not be found unless an intent to repeal is 'clear and manifest.'" *Id.* at 524 (citations omitted).

So, too, in this case, the Court should endeavor to read Sections 802(13) and 802(44) together, a result that is consistent not only with the Court's general interpretive practice, but also with the history, text, and purposes of the statute.

II. The Rule Of Lenity Should Apply To Resolve Any Ambiguity In The Scope Of Section 841(b)(1)(A).

Even if a contrary reading of the Act were plausible, and even if it were in some ways more persuasive, this Court has long refused to adopt the stricter of two plausible interpretations of an ambiguous criminal statute. To the extent the statute in this case is ambiguous, the choice between competing interpretations should be resolved by application of this traditional "canon of strict construction of criminal statutes." *United States v. Lanier*, 520 U.S. 259, 266 (1997). Applying this "rule of lenity" is particularly appropriate in the context of mandatory minimum sentencing provisions, which can have particularly serious consequences for criminal defendants, while also altering the traditional allocation of sentencing authority between the judicial, executive, and legislative branches.

A. The Courts Have Long Applied The Rule Of Lenity To Maintain Separation Of Powers And To Safeguard The Rights Of Defendants.

Chief Justice John Marshall described the rule of lenity as "perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). This "venerable rule," *United States v. R. L. C.*, 503 U.S. 291, 305 (1992), requires that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoke in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971) (internal quotation marks omitted). Although that particular formulation describes the rule of lenity in terms of defining crimes, the Court has consistently held that "this principle of construction applies to sentencing as well as substantive provisions." *United States v. Batchelder*, 442 U.S. 114, 121 (1979).[14]

The rule of lenity has its origins as a principle of strict construction developed by early English courts to moderate the harshness of contemporary

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[14] *See also R. L. C.*, 503 U.S. at 305; *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *Busic v. United States*, 446 U.S. 398, 406 (1980); *Ladner v. United States*, 358 U.S. 169, 178 (1958); *Prince v. United States*, 352 U.S. 322, 328 (1957); *Bell v. United States*, 349 U.S. 81, 83 (1955). Similarly, in determining whether conduct constitutes a single offense or multiple crimes the Court has applied the rule of lenity because the resolution impacts the severity of the punishment, even if the criminality of the defendant's conduct is not in question. *See Whalen v. United States*, 445 U.S. 684, 695 n. 10 (1980); *Simpson v. United States*, 435 U.S. 6, 15 (1978); *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221–22 (1952).

punishments. Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 749-50 (1935). At the time, the default punishment in the king's court for virtually all felonies was death. J.M. Beattie, CRIME AND THE COURTS IN ENGLAND, *1660-1800* 141 (1986). In contrast, those who associated with the Church could claim the "benefit of clergy," which entitled them to be tried before an ecclesiastical court, where the punishments were less harsh. *Id.* at 141-42. [15]

Over time, the court expanded access to the benefit of clergy.[16] In response, Parliament began to enact statutes that repealed the benefit, until even relatively minor property crimes were punishable only by death. *Id.* at 143–45. Concerned by the explosion of minor crimes subject to mandatory capital punishment, courts developed the practice of maintaining the benefit of the clergy unless Parliament had repealed it in extremely explicit terms. Hall, *supra*, at 750–51. For example, when Parliament repealed the benefit of the clergy for those who stole "horses," courts interpreted the statute as not applying to those who stole a single horse. William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND * 88.

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[15] In practice, defendants who were supposed to be tried before ecclesiastical courts rarely were. Instead, by the late 1500s, they received a smaller punishment from the king's court, usually branding or a short jail sentence. Beattie, *supra*, at 142.

[16] The courts granted the benefit of the clergy to those who could pass a literacy test, originally on the ground that only clergy were taught to read. *Id.* at 141. In the Renaissance, as literacy became more widespread, more and more defendants were able to claim the benefit of the clergy. *Id.*

The rule of lenity was carried over to the colonies and incorporated into the American legal tradition. Chief Justice Marshall grounded the rule in American constitutional norms in *Wiltberger*, 18 U.S. 76. There, the Court declined to apply a broad construction to a federal criminal statute, even while recognizing that it was "extremely improbable" that Congress would have intended the narrow construction the Court adopted. *Id.* at 105. The Chief Justice nonetheless explained that strict application of the rule of lenity serves a broader purpose in ensuring that courts do not wrongly impute upon Congress an intent to wield its criminal legislative authority more broadly than that body intended. He observed that this rule of strict construction was "founded on the tenderness of the law for the rights of individuals" and the recognition that it "is the legislature, not the Court, which is to define a crime, and ordain its punishment." *Id.* at 95.

These two justifications for the rule of lenity – protecting individual liberty and maintaining separation of powers – has continued to shape this Court's application of the rule of lenity. Thus, in *McBoyle v. United States*, 283 U.S. 25 (1931), the Court held that a statute criminalizing the transport of any stolen "self-propelled vehicle not designed for running on rails" did not apply to a stolen airplane. *Id.* at 26. Justice Holmes, writing on behalf of the Court, explained that although an airplane fell within the text of the statutory definition, a narrower interpretation – one limiting the word "vehicle" to "a thing moving on land" – was also possible. *Id.* Holmes observed that "[a]lthough it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language

that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *Id.* at 27.

The Court has recognized that these principles are no less important when setting punishments than when defining crimes. In *R. L. C.*, 503 U.S. at 294, the Court examined a statute that allowed a judge to impose "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult" and considered whether this "maximum term" referred to the statutory maximum or the maximum sentence under the federal sentencing guidelines. *Id.* at 294, 297. Four members of the Court believed that the statute unambiguously referred to the lower maximum under the guidelines, but stated that if the statute had been ambiguous, they would have resolved the question by resort to the rule of lenity. *Id.* at 305. Three other members believed that the statute was ambiguous and resolved the ambiguity by employing the rule of lenity. *Id.* at 307–08. As Justice Scalia explained, "[w]here it is doubtful whether the text includes the penalty, the penalty ought not to be imposed." *Id.* at 309 (Scalia, J., concurring).

B. The Rule Of Lenity Is Especially Appropriate In The Context Of Mandatory Minimum Sentencing Provisions.

For three reasons, the traditional justifications for the rule of lenity apply with special force when construing statutes imposing mandatory minimum sentences.

First, even more so than a statutory maximum sentence, like that at issue in *R. L. C.*, a mandatory minimum sentence has a profound impact on individual liberty, often a greater impact than the distinction between conduct that is legal and that which is criminal but subject to only minor sanction. *Cf. Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978) (applying the rule of lenity to construe scope of crime with maximum punishment of one year in jail upon first offense). The rule of lenity is "rooted in 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *R. L. C.*, 503 U.S. at 305 (quoting *Bass*, 404 U.S. at 347–48).[17] Federal mandatory minimum sentences, including the one at issue in this case, can leave defendants "languishing in prison" far longer than Congress intended if erroneously extended further than the legislature intended.[18] Accordingly, it is especially appropriate to require a clear statement from Congress before extending a mandatory minimum sentencing provision farther

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[17] *See also Thompson v. Oklahoma*, 487 U.S. 815, 857 (1988) (O'Connor, J., concurring) (declining to assume that state law subjected 15-year-old to the death penalty because "there [was] a considerable risk that the Oklahoma Legislature either did not realize that its actions [in passing a new law] would have the effect of rendering 15-year-old defendants death eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death eligibility").

[18] In this case, for example, the application of Section 841(b)(1) doubled petitioner's minimum sentence. *See* 21 U.S.C. § 841(b)(1)(A)(viii). In light of that ten-year difference, the decision in this case will determine whether Mr. Burgess will have an opportunity to play any role at all in the upbringing of his daughter, who was six-months old at the time of sentencing. CA J.A. 81.

than its language necessarily requires. *See Castillo v. United States*, 530 U.S. 120, 131 (2000) (recognizing that the length of the defendant's potential sentences weighed in favor of reading a statute in light of the rule of lenity).

Second, it is appropriate to require a plain statement from Congress before extending the reach of a mandatory minimum provision because such statutes necessarily alter the traditional balance between legislative, executive and judicial responsibilities in criminal sentencing. "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Gall v. United States*, 128 S. Ct. 586, 598 (2007) (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)). Mandatory minimums necessarily restrict the sentencing judge's traditional discretion in tailoring criminal punishment to the particular circumstances of the crime and the defendant. *See, e.g.*, American Bar Association Justice Kennedy Commission, REPORTS WITH RECOMMENDATIONS 6 (Aug 2004).

At the same time, as a practical matter, mandatory minimums shift a portion of judges' discretionary authority to prosecutors, who can exercise substantial control over a defendant's eventual sentence through their unreviewable charging decisions. *See id.* at 27; Barbara S. Vincent & Paul J. Hofer, Federal Judicial Center, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMERY OF RECENT FINDINGS 21 (1994) (Federal Judical Center Report) ("The transfer of discretion from neutral judges to adversarial prosecutors tilts the sentencing system toward

prosecution priorities, sometimes at the expense of other sentencing goals."); *see also* Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-*Mistretta *Period*, 91 NW. U. L. REV. 1284 (1997). Congress is aware of these effects. *See, e.g.*, U.S. Sentencing Commission, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUMS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991). While imposing mandatory minimum sentences is plainly within Congress's constitutional authority, courts should not assume that Congress has exercised that authority to alter the traditional balance of sentencing roles and authority without a plain and unambiguous statement in the text of the statute.

Third, mandatory minimum sentence provisions of the sort at issue here – which turn on prior criminal history – give rise to especially important concerns about fair notice. It is not simply that defendants may lack notice about the consequences of their *federal* crime. Ambiguity in such provisions can also deprive defendants and their state lawyers of fair notice of the possible future consequences of plea bargaining decisions in state court. *Cf.* American Bar Association, ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, Standard 14-1.4(c) (1999) ("[T]he court should also advise defendant that by entering the plea, the defendant may face additional consequence including . . . enhanced punishment if the defendant is convicted of another crime . . . . The court should advise the defendant to consult with defense counsel . . . concerning the potential consequences of the plea.").

C. The Rule of Lenity Requires Reading Sections 802(13) and 802(44) Together.

The court of appeals did not dispute that its interpretation of the statute in this case would be incompatible with the rule of lenity, if the rule was properly invoked. App. 8a. The court erred, however, in concluding that the statute was insufficiently ambiguous to warrant invocation of the rule. As the analysis in Part I, *supra*, demonstrates, the better reading of the 1994 conforming amendment is that Congress would have anticipated that the new definition it created in Section 802(44) would be read in light of the existing definition of "felony" in Section 802(13). At worst, however, the statute presents a genuine ambiguity, on that persists "even *after* resort to 'the language and structure, legislative history and motivating policies' of the statute." *Moskal v. United States*, 498 U.S. 103, 108 (1990) (citation omitted).

Even if, in the end, this Court were to share Chief Justice Marshall's suspicion that the interpretation required by the rule of lenity in this case is unlikely to be the one Congress's intended (assuming Congress has a clear intention at all), *see Wiltberger*, 18 U.S. at 105, that would not end the matter. Such doubt has never been a reason to abandon the judiciary's long-standing application of the doctrine. It remains open to Congress to revisit the statute and, if it intends a different scope for the enhancement provision, to make its intention clear through plain and unambiguous language. Given Congress's attentiveness to the issue of federal criminal sentencing and mandatory minimum sentences – as illustrated by the repeated amendments to Section 841(b)(1)(A) over the years – this Court has little reason to worry that a construction of the statute

Congress views to be unduly lenient would stand uncorrected for long.[19]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 22, 2008

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[19] *See, e.g.*, Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2193-2207 (2002) (noting that if "courts broadly (or even neutrally) interpreted criminal statutes in cases of ambiguity, this would often produce an overly broad interpretation that would likely stick because there is no effective lobby for narrowing criminal statutes that can generally influence legislative drafting or get on the legislative agenda to get a statutory override. In contrast, an overly narrow interpretation is far more likely to be corrected by statutory interpretation because prosecutors and other members of anti-criminal lobbying groups are heavily involved in legislative drafting and can more readily get on the legislative agenda.").

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-4997

D.C. Docket No. CR-03-107

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

KEITH LAVON BURGESS,
a/k/a Buck Black,
Defendant-Appellant.

Appeal from the United States District Court
District of South Carolina

(March 12, 2007)

Before: WILKINSON, NIEMEYER, and SHEDD, CIRCUIT JUDGES.

SHEDD, Circuit Judge:

Keith Lavon Burgess pled guilty to conspiracy to possess with intent to distribute and to distribute 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 846. In sentencing Burgess, the district court applied the enhanced 20-year mandatory minimum sentence required by 21 U.S.C. § 841(b)(1)(A) for an offense committed "after a prior conviction for a felony drug offense has become final." Burgess now appeals, arguing primarily that the district court erroneously applied the 20-year mandatory minimum because his prior South Carolina conviction for cocaine possession, which is the predicate offense supporting the enhancement, is classified under state law as a misdemeanor and, therefore, is not a "felony drug offense" within the meaning of § 841(b)(1)(A). We disagree. The term "felony drug offense" is specifically and unambiguously defined in 21 U.S.C. § 802(44) for purposes of the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801 *et seq.*, and Burgess's prior cocaine possession conviction fits squarely within that definition. Accordingly, we affirm.

I

Under § 841(b)(1)(A), a conviction rendered pursuant to § 841(a)(1) involving 50 grams or more of cocaine base results in a mandatory minimum 10-year

prison sentence.[1] Section 841(b)(1)(A) further provides that if the defendant committed the offense "after a prior conviction for a felony drug offense has become final," the mandatory minimum is enhanced to 20 years. Although § 841 does not define "felony drug offense," § 802(44) defines it for purposes of the CSA as "an offense that is punishable by imprisonment for more than one year under any law of . . . a State . . . that prohibits or restricts conduct relating to narcotic drugs . . . ."

Burgess's Presentence Report ("PSR") calculated his sentencing guidelines range to be 151-188 months based on a total offense level of 31 and a criminal history category of IV. Before sentencing, the government filed an Information pursuant to 21 U.S.C. § 851 notifying Burgess that he was subject to the § 841(b)(1)(A) 20-year mandatory minimum because of his prior conviction under S.C. Code Ann. § 44-53-370(d)(1) for misdemeanor possession of cocaine. Burgess received a one-year sentence for that conviction, but the maximum possible sentence was two years. *See id.* The PSR was amended to reflect the enhancement, and Burgess objected, asserting (inter alia) that his prior cocaine possession conviction is not

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[1] "Section 841(b)(1) provides penalties not only for violations of § 841, but also for transgressions of § 846 that involve a conspiracy to commit an offense defined in § 841." *United States v. Stokes*, 261 F.3d 496, 499 n.4 (4th Cir. 2001).

a "felony drug offense" within the meaning of § 841(b)(1)(A).

Specifically, Burgess argued that even though § 802(44) defines "felony drug offense" as being "an offense that is punishable by imprisonment for more than one year under any law of . . . a State . . . that prohibits or restricts conduct relating to narcotic drugs," the term as used in § 841(b)(1)(A) is ambiguous because another CSA definition provision, 21 U.S.C. § 802(13), defines "felony" as "any Federal or State offense classified by applicable Federal or State law as a felony." Invoking the rule of lenity, which provides that "an ambiguous criminal statute is to be construed in favor of the accused," *Staples v. United States*, 511 U.S. 600, 619 n.17, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), Burgess contended that "felony drug offense" in § 841(b)(1)(A) must be defined by incorporating the § 802(13) definition of "felony" into the § 802(44) definition of "felony drug offense," and such a reading mandates that the § 841(b)(1)(A) enhanced mandatory minimum applies only when a prior conviction is both classified as a felony *and* punishable by more than one year of imprisonment. Because his prior cocaine possession conviction is classified as a misdemeanor under S.C. Code Ann. § 44-53-370(d)(1), Burgess maintained that it is not a "felony drug offense."

The district court overruled this objection, concluding that "felony drug offense" for purposes of § 841(b)(1)(A) is defined by § 802(44) without reference to § 802(13). Because the prior cocaine possession conviction was punishable by more than one year of

imprisonment, the district court applied the § 841(b)(1)(A) enhancement and increased the mandatory minimum from 10 to 20 years. After granting a downward departure motion made by the government based on substantial assistance, the district court sentenced Burgess to 156 months of imprisonment.

Burgess thereafter noticed this appeal, and his attorney filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), stating that there are no meritorious issues for appeal, but raising two issues, one of which is the propriety of the § 841(b)(1)(A) enhancement.[2] After reviewing the entire record in accord with *Anders*, we directed the government to file a responsive brief, and we notified Burgess of his right to file a pro se supplemental brief in an *Anders* case (which he did not do).

Subsequent to Burgess's sentencing, two federal appellate courts considered the precise issue now before us, reaching conflicting results. Consistent with Burgess's position below and on appeal, the D.C. Circuit applied the rule of lenity and held that "felony

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[2] Burgess's attorney also raised the propriety of Burgess's base offense level calculation under *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). In light of our determination that the district court properly applied the 20-year mandatory minimum, we need not consider the *Booker* issue further.

drug offense," as used in § 841(b)(1)(A), is defined by §§ 802(13) and 802(44); under this reasoning, the applicability of the enhancement is limited "to those instances in which the prior drug offense is *both* punishable by more than one year and classified as a felony by the controlling authority." *United States v. West*, 393 F.3d 1302, 1315 (D.C. Cir. 2005). Rejecting this approach, the First Circuit held that "the definition of 'felony drug offense' contained in § 802(44) unambiguously controls for the purposes of determining whether the penalty enhancement in § 841(b)(1)(A) is triggered" and, therefore, the enhancement applies when the defendant has a prior drug conviction that is punishable by more than one year of imprisonment, regardless of how the offense is classified. *United States v. Roberson*, 459 F.3d 39, 51 (1st Cir. 2006), *cert. denied*, ____ U.S. ____, ____ S. Ct. ____, ____ L.Ed.2d ____, 2007 WL 506174 (Feb. 20, 2007). The parties have cited these cases in support of their respective positions, and the courts' opinions thoroughly detail their underlying rationales. *See Roberson*, 459 F.3d at 50-55; *West*, 393 F.3d at 1310-15.

II

The district court's interpretation of "felony drug offense," as it is used in § 841(b)(1)(A), involves a pure question of law, which we review de novo. *Ramey v. Director, O.W.C.P.*, 326 F.3d 474, 476 (4th Cir. 2003). Using common sense as a guide, *Kofa v. I.N.S.*, 60 F.3d

1084, 1088 (4th Cir. 1995) (en banc), "[o]ur first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S. Ct. 843, 136 L.Ed.2d 808 (1997). We determine the "plainness or ambiguity of statutory language . . . by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341, 117 S.Ct. 843. "Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Id.* at 340, 117 S.Ct. 843 (internal quotation marks omitted). In most instances, "[s]tatutory definitions control the meaning of statutory words," *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201, 69 S.Ct. 503, 93 L.Ed. 611 (1949), and "[w]hen a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning," *Stenberg v. Carhart*, 530 U.S. 914, 942, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000). Moreover, a statutory definition "which declares what a term means . . . excludes any meaning that is not stated." *Colautti v. Franklin*, 439 U.S. 379, 392 n. 10, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) (internal quotation marks omitted).

As we have noted, § 841 does not define "felony drug offense," but § 802(44) does in plain and unambiguous terms:

> The term "felony drug offense" means an offense that is punishable by

> imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

Like the First Circuit, whose reasoning we adopt, we believe that "[b]ecause the term 'felony drug offense' is specifically defined in § 802(44), and § 841(b)(1)(A) makes use of that precise term, the logical, commonsense way to interpret 'felony drug offense' in § 841(b)(1)(A) is by reference to the definition in § 802(44)." *Roberson*, 459 F.3d at 52. We discern no basis from the plain language or statutory scheme of the CSA to indicate that Congress intended "felony drug offense" also to incorporate the definition in § 802(13). We also reject Burgess's attempt to invoke the rule of lenity because we find that there is no "grievous ambiguity or uncertainty" in the pertinent statutes. *See Muscarello v. United States*, 524 U.S. 125, 138-39, 118 S.Ct. 1911, 141 L.Ed.2d 111 (1998) ("To invoke the rule [of lenity], we must conclude that there is a grievous ambiguity or uncertainty in the statute." (internal quotation marks omitted)).[3]

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[3] Apart from the foregoing, we reject Burgess's argument that the § 802(13) definition of "felony" must be incorporated into § 802(44) for an additional reason. In *United States v. Amaya-Portillo*, 423 F.3d 427 (4th Cir. 2005), we considered whether a state conviction for cocaine possession qualifies as an "aggravated

In light of our interpretation of § 841(b)(1)(A), Burgess's prior conviction for cocaine possession constitutes a "felony drug offense." Accordingly, the district court correctly applied the 20-year mandatory minimum to his sentence.

III

Based on the foregoing, we affirm the conviction and sentence. We direct counsel to inform Burgess, in writing, of the right to petition the Supreme Court of the United States for further review. If Burgess requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel

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felony" under U.S.S.G. § 2L1.2 if it is a misdemeanor under the applicable state law and punishable only as a misdemeanor under the CSA. Resolution of this issue required us ultimately to determine for purposes of 18 U.S.C. § 924(c) what constitutes a "drug trafficking crime," which is defined as "any felony punishable under the [CSA]." We concluded that § 802(13)—without reference to § 802(44)—provides the definition of "felony" under the CSA. Looking to §§ 802(13) and 802(44), we explained that "felony" and "felony drug offense" "are two different terms with different definitions under the CSA," and that a state offense can be a "felony drug offense" but not a "felony." 423 F.3d at 435. Because Burgess's argument is necessarily predicated on reading the § 802(13) definition of "felony" into the § 802(44) definition of "felony drug offense," our analysis in *Amaya-Portillo* negates his argument.

may move for leave to withdraw from representation. Counsel's motion must state that a copy thereof was served on Burgess.

AFFIRMED.

APPENDIX B

This appendix provides the relevant text of versions of 21 U.S.C. §§ 802 and 841(b)(1)(A), as originally codified, as amended in 1984 and 1988, and in its present form.

1. As enacted in 1970:

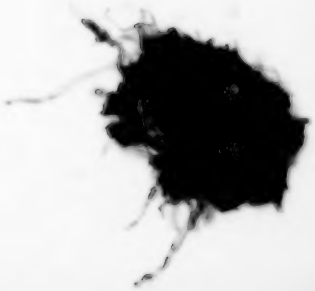
§ 802(13): The term "felony" means any Federal or State offense classified by applicable Federal or State law as a felony.

§ 841(b)(1)(A): If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both.

2. As amended in 1984:

§ 802(13): The term "felony" means any Federal or State offense classified by applicable Federal or State law as a felony.

§ 841(b)(1)(A): If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or simulating substances have become final, such person shall be sentenced to a term of imprisonment of not more than 40 years, a fine of not more than $500,000, or both.



3. As amended in 1988:

§ 802(13): The term "felony" means any Federal or State offense classified by applicable Federal or State law as a felony.

§ 841(b)(1)(A): If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment . . . For purposes of this subparagraph, the term "felony drug offense" means an offense that is a felony under any provision of this subchapter or any other Federal law that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances or a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances.

4. Present version, as amended in 1994:

§ 802(13): The term "felony" means any Federal or State offense classified by applicable Federal or State law as a felony.

§ 802(44): The term "felony drug offense" means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs . . . .

§ 841(b)(1)(A): If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which not be less than 20 years . . . .